

Painters Local Union No. 1178, International Brotherhood of Painters and Allied Trades, AFL-CIO (Roland Painting, Inc.) and James E. Phillips. Case 32-CB-1104

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On August 10, 1982, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, but not to adopt his recommended Order.¹

THE REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) of the Act by refusing to refer an employee for employment in violation of the exclusive nondiscriminatory job-referral system in its collective-bargaining contract, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall order Respondent to make James E. Phillips whole for any loss of earnings he may have suffered as a result of Respondent's failure to refer him for employment. Earnings are to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as initially established in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and at the appropriate rate of interest as set out in *Florida Steel Corporation*, 231 NLRB 651 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Painters Local Union No. 1178, International Brotherhood of Painters and Allied Trades, AFL-CIO, Hayward, California, its officers, agents, and representatives, shall:

¹ We shall issue an Order in lieu of the Administrative Law Judge's recommended Order, *inter alia*, to delete provisions which refer to Respondent's operation of the hiring hall in general, inasmuch as the complaint reflects, and the General Counsel reiterated at the hearing, that the only conduct alleged as unlawful is Respondent's refusal to refer employee Phillips.

1. Cease and desist from:

(a) Refusing to refer employees or applicants for employment in accordance with the terms of the exclusive, nondiscriminatory job-referral system contained in its collective-bargaining contracts with Roland Painting, Inc., and various other employers.

(b) In any like or related manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make James E. Phillips whole for any loss of earnings he may have sustained because of Respondent's unlawful failures to refer him for employment by paying him a sum equal to what he would have earned absent the unlawful conduct, plus interest, as provided in the section of this Decision entitled "The Remedy."

(b) Post at its business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix."² Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the said Regional Director sufficient copies of the attached notice marked "Appendix" for posting by Roland Painting, Inc., if willing, in conspicuous places, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to refer employees or applicants for employment in accordance with

the terms of the exclusive, nondiscriminatory job-referral system contained in our collective-bargaining contracts with Roland Painting, Inc., and various other employers.

WE WILL NOT in any like or related manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make James E. Phillips whole, with interest, for any loss of earnings he may have sustained because of our unlawful failures to refer him for employment.

PAINTERS LOCAL UNION NO. 1178,
INTERNATIONAL BROTHERHOOD OF
PAINTERS AND ALLIED TRADES,
AFL-CIO

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Oakland, California, on July 14, 1982. The charge was filed December 11, 1981, by James E. Phillips, acting in his individual capacity (Phillips). The complaint issued February 24, 1982, was amended during the hearing, and alleges that Painters Local Union No. 1178, International Brotherhood of Painters and Allied Trades, AFL-CIO (Respondent), violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (Act), on or about January 7, 1982, by failing to dispatch Phillips to a job with Roland Painting, Inc. (Roland Painting).¹

Roland Painting is a painting contractor in San Jose, California. It annually sells over \$50,000 in goods and services to customers within California which meet the Board's direct inflow and/or outflow jurisdictional standards, and thus is an employer engaged in, and affecting, commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I. JURISDICTION

Roland Painting is a painting contractor in San Jose, California. It annually sells over \$50,000 in goods and services to customers within California which meet the Board's direct inflow and/or outflow jurisdictional standards, and thus is an employer engaged in, and affecting, commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

¹ As noted, the charge predates the alleged misconduct. The conduct contemplated by the charge, when filed, is not in issue. The conduct in question, occurring during the pendency of the charge, is deemed by the General Counsel to fall within the scope of the charge.

III. THE ALLEGED MISCONDUCT

A. Facts

Respondent's standard labor contract provides that its hiring hall is to be the sole source of painters hired by signatory employers. With exceptions not now relevant, the contract calls for the referral of those seeking work through the hiring hall "in the order in which their names appear on the [out-of-work] list." A new out-of-work list is established at the start of business each Monday morning, necessitating weekly reregistration by those wishing their names to be on each new list.

Roland Painting is signatory to the labor contract. About January 6, 1982, it asked that Respondent refer two painters to a project on which it was working, Lustig Court in Hayward, California. Although Phillip's name was atop that week's out-of-work list,² and he was in all respects qualified for referral, Respondent did not refer him. It instead referred the second person on the list, Chuck Frank, January 6; and one not on the list, Roger Matson, January 7. Frank and Matson worked for Roland Painting until about January 18.

Roy Pellegrini, business agent, testified that he referred Frank. Explaining why he bypassed Phillips, Pellegrini averred: "Because Mr. Frank was out of work a lot longer than Mr. Phillips. Mr. Phillips had just came off a job."

Dale Ball, financial secretary, testified that he referred Matson. Explaining why he bypassed Phillips, Ball stated:

Roger [Matson] had been out of work for quite a few months. And if he had a job, he wouldn't go to jail for awhile. And he was about ready to lose his house and everything else, so I dispatched him to the job.

Ball elaborated that "one of the main factors" in Matson's being chosen was that a jail term to which Matson had been sentenced would be delayed if he had a job. Ball added, however, that he "probably would have sent" Matson rather than Phillips, regardless of Matson's personal problems, stating: "I don't know why. I mean, maybe I would have, maybe I wouldn't have. I don't know. But I probably would have sent Mr. Matson."

A further "factor" in Phillips' being bypassed in favor of Matson, according to Ball, was that Phillips had worked more recently. Ball asserted: "We've always taken the guys that's been out of work the longest." Respondent concededly maintains no records by which to ascertain relative lengths of unemployment. Ball proclaimed: "I don't have to . . . I know how long a guy's been on unemployment." He later admitted, however, that he did not know "right off hand" if Matson had been out of work longer than everyone on the out-of-work list and that "it's possible" he had not.

Ball advanced yet another reason for Matson's being referred—that he happened to be in the hall when the Roland Painting request was received. Ball declared that

² Phillips had gone to the hall at 7 a.m., Monday, January 4, to ensure his being first in line to sign the list when the hall opened at 8 o'clock.

he generally refers "the men out of the hall [i.e., physically present] first," regardless of the out-of-work list.³

Ball testified, finally, that the out-of-work list is neither intended nor used as a determinant of referral order. He explained:

They have to sign the list in order to get unemployment [compensation]. That's the reason we use the list. We've always used it that way.

This testimony, without documentary or other corroboration, seemed blatantly self-serving. There is no evidence that those using Respondent's hall as a referral vehicle ever were apprised that the list was for so limited a purpose.

It is undisputed that, before the referrals in question, Phillips had worked more recently than Frank and Matson. The painting trade in the area, in common with the construction industry generally, was suffering heavy unemployment at relevant times.

In the fall of 1981, Phillips complained to the president of Respondent's parent international, among other things, about Respondent's improper operation of the hiring hall. Pellegrini and Ball denied that this influenced their bypassing of him on the occasions in question. Phillips received a referral in December 1981, apparently after the matters of which he complained had been resolved by Respondent internally.

The labor contract contains a procedure whereby anyone "who feels that he has not been dispatched in accordance with" the contract may protest to a so-called examining committee; and may appeal any "opinion" of the committee that "is less than unanimous" to "an impartial umpire." Respondent's attorney, by letter dated January 25, 1982, and thereafter, invited Phillips to use this procedure. An *ad hoc* examining committee accordingly convened May 11. Phillips, although aware of the meeting, did not appear, however, and the committee took up action.

The record does not disclose the manner in which an examining committee is chosen. Respondent's counsel concedes that its makeup would not warrant Board deferral to its processes. Counsel nevertheless argues that, since "the procedure provides at its ultimate step" for resolution by "a totally neutral arbitrator . . . with full powers of remedy," it is "totally adequate."

³ That Matson in fact was in the hall when the Roland Painting request came in is doubtful. The request apparently arrived on January 6, as witness Frank's referral of that date. Matson, as earlier noted, was not referred until January 7.

B. Conclusions

The Board has stated that a union violates Section 8(b)(1)(A) and (2) "where it discriminatorily refuses to refer an employee or applicant for employment pursuant to the terms of an exclusive referral system."⁴ In the present case, Respondent's bypassing of Phillips on January 6 and 7 in favor of Frank and Matson was contrary to the terms of the exclusive referral system. It is concluded that Respondent, by so doing, violated Section 8(b)(1)(A) and (2) as alleged.⁵

A union perhaps may depart from literal adherence to the terms of an exclusive referral system where "its actions [are] necessary for the effective performance of its functions as bargaining representative."⁶ Such occasions at best are exceptional, however, and the present plainly is not among them. Indeed, the assorted reasons put forth by Ball for choosing Matson over Phillips, and his testimony generally concerning Respondent's operation of the referral system, reveal an utter absence of "any objective criteria or standards for the referral of employees" and an attendant arrogation of "unbridled discretion" by those to whom the system is entrusted. This alone establishes a violation of Section 8(b)(1)(A) and (2).⁷

CONCLUSION OF LAW

By failing to refer James E. Phillips in accordance with the terms of the exclusive job-referral system in its collective-bargaining contract with Roland Painting, Inc., on January 6 and 7, 1982, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

[Recommended Order omitted from publication.]

⁴ *Painters Local Union No. 1555 affiliated with the International Brotherhood of Painters and Allied Trades, AFL-CIO* (Stephen Strickland), 241 NLRB 741, 742 (1979). Also *International Brotherhood Electrical Workers Local 401 (Stone and Webster Engineering Corporation)*, 251 NLRB 321 (1980); *Local 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.)*, 223 NLRB 1499 (1976).

⁵ This conclusion does not require a determination whether Respondent was influenced, when it bypassed Phillips, by his complaints to the parent international in the fall of 1981. Respondent's contention is rejected that the Board should defer to the contractual procedure for protesting improper operation of the hiring hall. Respondent concedes that the first level of review under that procedure, the examining committee, is inadequate; and access to the next, arguably neutral, level is available only when the "opinion" of the examining committee is "less than unanimous." The objectivity of that process thus is not sufficiently assured. Cf., *Electrical Workers Local 401 (Stone and Webster Engineering Corp.)*, *supra* at 251 NLRB 321, fn. 3; *Electrical Workers Local 675 (S & M Electric Co.)*, *supra*.

⁶ *Painters Local 1555 (Stephen Strickland)*, *supra* at 241 NLRB 742.

⁷ *Local 394 Laborers' International Union of North America, AFL-CIO (Wakil Abdunafi)*, 247 NLRB 97, fn. 2 (1980).